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No. 85-1741

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

AMERICAN MINING CONGRESS,
AMAX INC.,
ASARCO INCORPORATED,
ST. JOE MINERALS CORPORATION,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The National Association of Manufacturers ("NAM") respectfully submits this brief *amicus curiae* pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

The NAM is a non-profit voluntary business association incorporated under the laws of the state of New York. The NAM represents approximately 13,000 com-

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[1] These consents have been filed with the Clerk of the Court.

panies, large and small, located in every state of the Union. Further, the NAM is affiliated with an additional 158,000 businesses through the Associations Council and the National Industrial Council. The membership of the NAM represents an estimated 80 percent of all goods manufactured in the United States and our members employ approximately 85 percent of all workers in the manufacturing sector.

The NAM and its members are vitally affected by the federal regulatory process of virtually every government agency and department. For this reason, the NAM and its members are active participants in this process and frequently file comments or testify on proposed regulations. The NAM and its members view their participation in this process as an obligation of responsible citizenship and a right that is protected by the First Amendment to the Constitution. The meaningful exercise of this right and obligation requires that we be fully informed of the scope of proposed regulations and the direction that federal regulators intend to proceed.

We believe that the decision of the United States Court of Appeals for the Fourth Circuit below has the effect of stifling fair and relevant discussion of regulatory proposals that are required by the Administrative Procedure Act to be open for public comment. If left undisturbed, this decision could have the effect of eviscerating not only this statutory right to notice and an opportunity to comment, but also the First Amendment right to petition the Government for a redress of grievances. Such a result discourages the very input that is essential to reasoned and balanced rulemaking and undermines the foundations of participatory democracy envisioned by the Framers of this Constitution. For these reasons, as well as those explained in further detail in this brief, the NAM submits the following arguments to this Court in support of the Petitioners.

SUMMARY OF THE CASE

Pursuant to the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982) the United States Environmental Protection Agency (EPA) proposed twelve sets of nationally applicable effluent guideline regulations for nonferrous metals manufacturing, including the lead, zinc and copper industries. These proposals, spanning 95 pages in the Federal Register, and supplemented by a 3-volume, 2100-page proposed Development Document, sought comments from interested parties about six primary "control and treatment options" that were selected for final consideration for the treatment of waste water from nonferrous metals manufacturing plants. EPA's proposed Development Document included more than 25 alternative waste water control options, including a process of sulfide precipitation that was subsequently adopted as a primary method of compliance with the Clean Water Act's requirements. From the 25 technologies, EPA selected six for final consideration and specified them in the Federal Register proposal. Although the EPA requested interested parties to comment on alternative technologies, the six technologies were the basis of the rulemaking proceeding, and after the comment period expired, EPA announced that a seventh technique (sulfide precipitation) was adopted by the agency and included in final regulations promulgated on March 8, 1984. 49 Fed. Reg. 8760.

Petitioners brought suit [2] to set aside certain of the EPA's effluent limitation guidelines and to remand the rulemaking proceeding for further consideration of the sulfide precipitation option. That court ruled that EPA's mention of the sulfide precipitation technology in the proposed Development Document, along with its request that interested parties give comments on similar "alternative

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[2] Petitioners filed suit in the Eight Circuit, and the case was transferred to the Fourth Circuit and consolidated with petitions from other industry groups.

treatment technologies" did not violate the provision of the Administrative Procedure Act ("APA") that requires notice to the public of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1966). It held that EPA could make " 'substantial changes' in its original proposed rule if the changes [were] a 'logical outgrowth' of the original proposal and the notice and comments upon it." *Kennecott v. EPA*, 780 F.2d 445, 453 (4th Cir. 1985). This ruling is now on appeal.

SUMMARY OF THE ARGUMENT

The NAM believes this case raises an important issue concerning the point at which the rulemaking proposals of regulatory agencies change sufficiently enough to warrant a restatement by the agency of their scope, focus and priority. Our democratic system of government demands, particularly in the Age of High Technology, that each branch of government be fully aware of all recent developments and other aspects and ramifications of pending action. Regulatory agencies, charged by law with full and fair consideration of all relevant issues in proposed rulemakings and enforcement activities, are on the front lines of this process, and their decisions have wide-ranging impact with minimal judicial review.

This Court should take this opportunity to adopt a rule of judicial review to provide guidance to the lower courts concerning the point at which a regulatory initiative must be submitted for further comment. Since the Administrative Procedure Act does not provide explicit procedural guidelines for such a supplemental comment period, we would suggest that such a period could be accommodated in a relatively short time frame, particularly since interested parties will already be familiar with the background and supplementary documentation for the rulemaking. This would satisfy both the requirements of the APA, the First Amendment, and the needs

of the administrative agency for a prompt and effective resolution of regulatory issues. Indeed, failure to repropose a rule that is significantly altered during notice and comment proceedings is arbitrary and capricious, and a violation of the APA.

This Court has never before ruled upon the need for regulatory agencies to give reasonable notice of significant substantive regulatory changes arising from comments in a rulemaking proceeding, and a decision is clearly called for.

ARGUMENT

I. FIRST AMENDMENT PRINCIPLES, INCORPORATED BY CONGRESS INTO NOTICE AND COMMENT RULEMAKING, PROTECT THE PARTICIPATION OF THE PETITIONERS AND IMPROVE THE ADMINISTRATION OF LAW.

Because the right to petition the government for redress of grievances is among the most precious of liberties enshrined in the Bill of Rights, any attempt to limit or impair the exercise of that right must be closely examined and justified by a clear public interest. *Thomas v. Collins*, 323 U.S. 516, 530 (1946); *United Mine Workers, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). This Court has developed judicial doctrines to bolster the free flow of opinion to political bodies in order to ensure intelligent decisionmaking. For example, the Court recognizes a constitutionally grounded exemption from liability under the antitrust laws for companies or individuals that work together to effect legislative or administrative change, even if that change has anticompetitive significance. *See Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Likewise, the Court has struck down restrictions on the freedom of speech and of the press to ensure that the public (including officials and

representatives in the government) are assured a free flow of information on which to base judgments or opinions in our society. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

In the rulemaking context, the freedom of speech is no less important a right for the speaker as it is a necessity and statutory mandate for the regulatory agency. But speech without focus, due to the failure of a regulatory agency to give adequate notice, loses its substance. It suffers from lack of direction, and prevents the speaker from fully and freely expressing his position. Thus, an overly broad or misdirected notice of proposed rulemaking saps the essence of free speech.

The NAM recognizes that statutory regulation of certain aspects of private enterprise, administered by the established executive departments of the government, is a legitimate function of the federal government and is in the public interest. However, the delegation of quasi-legislative authority to federal agencies lacks political accountability when exercised exclusively by unelected regulatory officials. We therefore believe that public participation in the agency decisionmaking process is an essential mechanism that ensures political accountability.

The First Amendment requires no less. In order for the right to petition the government for redress of grievances to be effective, a party must be aware of what governmental action will adversely affect him at a time when petitioning the government will not be a useless gesture. When a complicated and time-consuming rulemaking proceeding is completed, any amendments to satisfy the grievances of adversely affected parties may, as a practical matter, take months or years to fully and properly address, given the workload, priorities, and shifting responsibilities of the agencies charged with the promulgation and enforcement of federal law. The right to petition for redress of grievances is no right at all if the governmental agency that hears the grievance has

effectively and practically precluded resolution of the grievance at the appropriate time. Changing a final rule under notice and comment procedures requires the same panoply of procedural protections that applied in the promulgation of the rule in the first instance. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-42 (1983). Thus, petitioners' request for reconsideration of the final rule promulgated by EPA is decidedly less of right than if the request were accepted by the agency before promulgation of the final rule. With consideration of all arguments before final adoption of a rule, the EPA could avoid having to justify both its position on the final rule and its position on any amendments to the final rule in separate documents by a reasoned analysis supported by substantial evidence on the record considered as a whole. It would much more easily and willingly analyze and decide upon suggested changes and other comments, and would thus accord to the First Amendment right of petition its proper stature in the context of an administrative rulemaking.

For regulation to be fair, each branch of government must be fully aware of all recent developments and other aspects and ramifications of pending actions. Due process and the constraints of the APA require an agency to give notice of either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3)(1966). This notice must be "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking." *Chocolate Manufacturers Association v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985). The *Chocolate Manufacturers* case and others clearly state and apply the rule that substantial changes from the proposed rule to the final draft require some sort of opportunity for affected parties to be heard. 755 F.2d at 1105. It is imperative that this Court now agree to decide whether

the *Chocolate Manufacturers* case properly states the guiding principle, and ultimately whether the adoption of the sulfide precipitation technology in addition to the six other technologies that were the primary focus of the rulemaking constitutes a sufficient change in the scope or focus of the rulemaking to warrant an appropriate and limited additional notice and period of time in which interested parties may respond. This additional comment period, it must be noted, applies with equal force to all parties interested in the outcome, and EPA may well discover that there is additional information of which it was not aware that further supports its ultimate regulatory decision.

In any case, because technology and our understanding of chemical, biological or other natural forces is becoming so complex and subject to rapid change, a federal agency must ensure that it properly addresses the full implications of its proposed action. It must give the benefit of the doubt whether a change is significant to the public, since the burden of additional notice and comment is minimal compared to that imposed on affected parties after final promulgation of the rule.

Regulatory agencies are on the front lines in the development, interpretation and enforcement of a tremendous quantity of federal law. This Court has recently reaffirmed the guiding principle in administrative regulation cases that reviewing courts should normally defer to the expertise of the agency in technical and complex areas. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). For this reason, procedural determinations by agencies regarding whether to resubmit a significant change in a proposed rule to the public for additional comments are of even more importance. Indeed, judicial review of such decisions is strict, and not limited by the rule of deference accorded determinations by regulatory agencies. *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir.

1979), *cert. denied*, 444 U.S. 1096 (1980). Strict judicial review of procedural determinations by such agencies is essential if the courts will continue to defer to regulatory expertise on the technical issues.[3] Without fairly strict limits on the ability of agencies to make substantial changes in rules without notice to the public, agencies in effect will become courts of last resort, eliminating the judicial branch from any substantive role in the review of regulatory judgments.

A Supreme Court ruling in this case is important to hundreds and hundreds of manufacturers, environmental groups, and individuals affected by EPA regulations. Review by the Supreme Court will also affect the decision-making process of other agencies. For example, proposed regulations under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1985) may involve complex and sophisticated analyses of environmental and epidemi-

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[3] There is a close correlation between the adequacy of notice by a regulatory agency and the amount of deference a reviewing court should exercise. The more leeway an agency has in deciding substantive issues, the more courts should guarantee that procedural requirements have been scrupulously followed. Conversely, if courts were expected to accord *de novo* review of substantive agency determinations (which, of course, is not the law) strict adherence to procedural requirements might not be as important from a constitutional perspective, since affected parties would have a full and fair opportunity to air their grievances on appeal. Where there is some doubt about the adequacy of notice, reviewing courts should pay particularly close attention to the substantive judgments of the agency and the opposing arguments of affected parties. In this case, a number of substantive and technical issues have been raised by petitioners in *Secondary Lead Smelters Ass'n, Inc. v. Ruckelshaus* (No. 85-1748), on appeal from the same Fourth Circuit decision. The adequacy of notice was raised in that petition as well, although its primary focus is on the substantive problems at the administrative level and procedural problems at the appellate level. Because of the question of adequate notice, this Court should approach the petitioners' substantive arguments in *Secondary Lead Smelters Ass'n* with precision and in detail to protect the rights of the parties and the integrity of the administrative process.

ological data relating to employee exposures to potentially hazardous materials in the workplace. Other environmental statutes also require highly sophisticated and complex rulemaking, such as those under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (1983), in which the EPA must analyze biological and physical evidence in order to classify hazardous substances according to such factors as toxicity and carcinogenicity. It is just as an important in these areas for the Court to provide guidance to the public regarding the extent to which modifications or alterations of original rulemaking proposals require an additional opportunity for public comment before final implementation.

II. THIS COURT IS THE ONLY APPROPRIATE FORUM FOR RESOLVING HOW THE STATUTORY STANDARDS SHOULD BE APPLIED.

Determining the adequacy of notice is a judicial, not an administrative, function. *National Black Media Coalition v. FCC*, Docket No. 85-4121, 3675, 3684 (slip op., 2d Cir., May 27, 1986). Adequate notice is a critical starting point affecting the integrity of an administrative proceeding, and is essential to improving the quality and fairness of the rulemaking and the enhancement of judicial review. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

Courts have struggled to decide when a rulemaking proceeding has evolved sufficiently to require an amended notice and opportunity to comment on the issues to be resolved. The *Chocolate Manufacturers* case involved a final rule that eliminated flavored milk from a federally funded food program based on comments from the public, without giving any indication to the public that that course of action was contemplated. *Chocolate Manufacturers Association v. Block*, 755 F.2d 1098 (4th Cir. 1985). In that case, the Fourth Circuit criticized the inadequacy of notice and ordered the administrative

agency to reopen the comment period to afford a fair opportunity for interested parties to comment. 755 F.2d at 1107. It decided that the final rule "dramatically altered the proposed rule" and constituted "a complete reversal." As in the instant case, the changes were based on comments received.

Such a change in a rule could have been expected to generate a considerable amount of comment, both favorable and unfavorable, from affected parties had they realized that the agency was going to take that action. In another case, the Third Circuit ruled that the absence of comments from groups which could be expected to oppose or be affected by a significant change from a proposed rule to a final rule belies the contention that notice of the impending change was adequate. *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1019-20 (3d Cir. 1972). Thus, a reviewing court should look not only at the actual references to the proposed change in the official notice in the Federal Register, but also at the breadth of comments from affected parties, to determine whether notice was full and fair. This is not to say that interested parties who were fully apprised of the impending change but failed to file comments should have a "second bite at the apple." However, where there is doubt as to the adequacy of notice followed by complaints from interested parties, and a dearth of comments from interested parties on the relevant point in the administrative record, a reasonable suggestion of inadequate notice is indicated. This Court must state and explain these procedural points in order to advance the progress and clarity of rulemaking to the benefit of both the agencies and the regulated communities throughout the country.

Several courts have adopted a similar but not identical test known as the "logical outgrowth" test. It provides that a reviewing court will allow an agency to make substantial changes in its original rulemaking proposal as long as they are "in character with the original scheme"

and "a logical outgrowth" of the notice and comments already given. *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985); *South Terminal Corp. v. EPA*, 504 F.2d 646, 658, 659 (1st Cir. 1974). The opinion below was based on the notice issue in the logical outgrowth test, but it ignored the crucial factors. 780 F.2d 445, 453 (4th Cir. 1985). It was based on the court's determination, from EPA's references to materials in the 50,000-page administrative record and not mentioned in the Federal Register, that petitioners should have expected the change. Such a finding puts an impossible burden on parties who file comments based on the Federal Register notices of federal agencies.

Even if the Fourth Circuit had properly applied the logical outgrowth test, it is by no means clear that the test produces the same results as a test which considers the substantiality of a rule's change, the complexity of the rule, and the extent of attention by interested parties to the proposed modification. We underscore the opinion of Justices Rehnquist and Powell that this Court should grant certiorari to examine the question. *Eli Lilly & Co. v. Costle*, 444 U.S. 1096, 1097 (1980) (Rehnquist, J., joined by Powell, J., dissenting from order denying certiorari). The question is a recurring one and one "upon which there will never be a 'square conflict' among the various Courts of Appeals, since the differences between the originally promulgated regulations and the finally promulgated regulations will necessarily be ones of degree." 444 U.S. at 1097-98 (Rehnquist, J., dissenting from order denying certiorari).

A rule subjecting agencies to a supplemental notice and comment requirement is also necessary to prevent "regulation by ambush," where an agency simply proposes a rule and states in the Federal Register that it might change the rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact or rationale, or any other alterna-

tives under consideration. An agency may not change a rule on the basis of comments alone if the interested parties were not apprised of how the proposed rule would change. *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985). Rather, the proper method is to repropose regulations that are significantly altered in response to comments. *Ethyl Corp. v. EPA*, 541 F.2d 1, 48-49 & n.100 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976). The agency's failure to repropose under such circumstances is arbitrary and capricious, and a violation of the APA. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977).

It is common practice in regulatory proceedings for an agency to narrow the focus of its inquiry to a select number of realistic options for the final regulation. It would be an insurmountable burden on all interested parties, whether for or against a particular regulation, to have to deal with a potpourri of technologies or options that are available but that are not referred to in the Federal Register as those selected by the agency for final consideration. It would be a monumental waste of time and resources for all interested parties to provide full documentation to an agency on all possible options that might be considered. It is unrealistic and unfair to assume that interested parties should have a crystal ball to forecast possible agency decisions. Rather, it is appropriate to focus on those specific options for which the agency has specifically requested comments. In the kind of wide-ranging rulemaking under consideration in this case, it is essential for interested parties to focus on the primary issues, although they might also include mention of additional issues they feel deserve further consideration by the agency.

In addition, requiring an agency to resubmit rules for public comment furthers the goals of the administrative process and is not burdensome on the agency. Additional time for interested parties to comment would be mini-

mal, since they would already be on notice of the broad parameters of the rule when it was first proposed. Any additional comments made would be easier for the agency to digest, since they would be focused on the new change rather than on the other provisions already covered in the first notice and comment proceeding. Thus, an additional notice and comment period is a reasonable solution to a situation that threatens the fairness of the regulatory process.

It is reasonable to conclude that the sulfide precipitation technology, selected by the EPA after the comments, was not a logical and closely-related outgrowth of the initial EPA proposal. It was a substantial change affecting numerous parties who would have commented if possible, and further notice and comment is necessary and reasonable to ensure that these parties focus their attention and comments on this technology to provide relevant metals-industry data for the EPA to consider. The NAM urges this Court to set forth the legal underpinnings on which such a decision can be made.

CONCLUSION

The freedoms enshrined in the Bill of Rights and incorporated into the Administrative Procedure Act are endangered when regulatory agencies can adopt final regulations that are significantly different from those originally announced under the APA to interested parties. Both the First Amendment and the APA were intended to survive and adapt to technological progress and the ever-increasing informational needs of the public and of governmental authorities. Unless redirected by this Court, lower courts may increasingly defer to the expertise of regulatory agencies on substantive issues even though the agencies have not adequately followed procedures that assure a full and fair discussion of all significant substantive issues.

We therefore respectfully request that this Court grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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